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No. 84-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,
Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE WASHINGTON POST AND THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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BRIEF OF THE WASHINGTON POST AND THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE

The Washington Post ("The Post") and The American Civil Liberties Union ("ACLU") submit this brief as *amici curiae* in support of respondents' claim that the District Court should not have disqualified James G. Butler for his communications with the press. Pursuant to Rule 36.2 of the Rules of this Court, all parties to this action have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the clerk.

INTEREST OF THE AMICI

The Post publishes a newspaper of general circulation in the metropolitan Washington D.C. area that reports on matters

of local, regional and national interest. In its frequent coverage of legal proceedings and related agency actions, it relies heavily on attorneys, who are often the most informed individuals, for information about the underlying issues and the status of the proceedings, particularly at the pretrial stage. Consequently, The Post has an interest in the development of legal principles that determine whether a lawyer can be punished for communicating with the press when no court order prohibits communication and when a similar communication to a non-press individual was not punished.

The ACLU, a national, nonpartisan organization of over 200,000 members, was founded over 60 years ago to preserve and protect the fundamental principles of the Bill of Rights. It has frequently appeared in this Court, both as representative of parties and as *amicus curiae*. The ACLU's interest in this case stems from the longstanding concern of the organization and its members for protecting to the fullest extent the rights secured by the First Amendment to the Constitution. The extent of one of those rights—an attorney's right to discuss matters of public interest outside the courtroom—is at issue in this case.

STATEMENT OF THE CASE

In May, 1980 James G. Butler and his co-counsel filed a lawsuit on behalf of plaintiffs Cynthia and John Koller and their daughter Anne Elisabeth Koller against Richardson-Merrell Inc. ("Richardson-Merrell"). The complaint alleged that Mrs. Koller's use of Bendectin, a drug made by Richardson-Merrell, during the first trimester of her pregnancy caused her daughter's severe birth defects. Pet. App. 2a. Trial was expected to occur in February or March, 1983. J.A. 247.

In a letter dated January 28, 1983, Butler wrote to Arthur H. Hayes, then Commissioner of the Food and Drug Administration ("FDA"), concerning birth defects that have occurred after the mothers took Bendectin during pregnancy. He wrote,

> "[i]t appears to me that solely on a humanitarian basis, the time has now come for the Food and Drug Administration to do something to warn the public of the dangers of Bendectin." J.A. 124.

He enclosed 14 drug experience reports ("DERs") he had compiled, each indicating the birth defects of a child and the use of Bendectin by the mother. J.A. 134. On the same day, Butler wrote Morton Mintz, a staff writer at The Post, enclosing a copy of his letter to Commissioner Hayes and the 14 DERs. Butler has stated that his only motive in communicating with the press was to remove the drug from the market. J.A. 137.

Richardson-Merrell had previously filed a motion to exclude DERs from evidence. On January 31, 1983 an Order and an Opinion on the admissibility of DERs were filed and handed to the parties in open court. J.A. 84, 91. The court denied Richardson-Merrell's motion to exclude all DERs, allowing plaintiffs to introduce five samples from those DERs that were initiated less than one year after birth. J.A. 91. Previously, on January 17, the court had ruled that evidence of the birth defects of two of the individuals, Marco Cordova and Pauline Sands, was inadmissible. J.A. 63. Cordova and Sands were two of the individuals described in the 14 DERs.

Morton Mintz interviewed Butler on February 1, 1983, J.A. 249-50, and on February 7, The Post published an article about seven lawsuits that had been filed alleging that Bendectin caused birth defects. J.A. 129. It referred to the 14 DERs, seven of which related to the suits that had been filed. The article quoted the FDA as saying that as of the previous week it had no evidence that Bendectin caused the defects, and stated that the Public Citizen Health Research Group, "FDA's most relentless critic," also found no causal connection. It quoted Richardson-Merrell's spokesman at length, then went on to describe both sides of the dispute. Three paragraphs out of the total of 23 referred to the instant case, and those were in the fourth column of the six-column story. J.A. 129.

On the day the article was published, Richardson-Merrell moved to impose sanctions on Butler for having communicated with the press. Richardson-Merrell alleged that the release of the information to the press will "inevitably create unfair prejudice among some of the jury panel." J.A. 95-96. When Butler wrote Mintz, the jury panel for February, but not March, had been selected. Richardson-Merrell's motion had the effect of postponing jury selection and the trial.

On January 6, 1984, the court issued an Order and Opinion disqualifying Butler from further representation by revoking his *pro hac vice* admission solely because of his contact with The Post. Pet. App. 72a, 81a. The court did not base its actions on Butler's contact with the Commissioner of the FDA. The court stated that revocation of a *pro hac vice* appearance is within the discretion of the court; that conduct that does not violate a Disciplinary Rule of the Code of Professional Responsibility may be sufficient to justify disqualification; and that the standard for revocation of a *pro hac vice* appearance is "whether the conduct of the attorney is so impermissible as to warrant the revocation of his admission *pro hac vice.*" Pet. App. 75a. Applying this standard, the court concluded:

> "Butler's knowing release to the Post of information previously ruled inadmissible by this court was a flagrant circumvention of the Orders of this Court as Mintz's article appeared in the Post in February 1983 after the jury panel had been drawn for that month and after the Court and the parties were preparing for trial." Pet. App. 77a-78a.

The court did not find that Butler had violated any disciplinary rules or that he had violated any court order. Nor did the court find that an impartial jury could not be selected from the jury pool through the use of voir dire.

The Court of Appeals for the District of Columbia reversed the decision of the District Court and remanded for the reinstatement of the appearance of Butler on behalf of the plaintiffs. 737 F.2d 1038 (D.C. Cir. 1984) (Pet. App. 1a-71a). The Court of Appeals concluded that attorneys admitted to practice *pro hac vice* are not more vulnerable to disqualification than attorneys who are licensed to practice before the court, Pet. App. 35a; that disqualification is appropriate only in cases of "truly egregious misconduct likely to infect future proceedings," Pet. App. 38a; and that the record could not support a finding that Butler's conveyance of information to the press was likely to infect future proceedings, Pet. App. 55a. In concluding that future proceedings would not be infected, the court stated that the article that appeared in *The Washington Post* " was far

from inflammatory, and gave substantial space to those, including defendant, who disputed Butler's assessment of the teratogenic qualities of Bendectin." Pet. App. 54a. The article was printed before jurors were assigned to the case, and the court had "no basis for believing that voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article." Pet. App. 55a (footnote omitted).

SUMMARY OF ARGUMENT

The record of this case provides ample grounds for this Court to affirm, without reaching any constitutional issues, the reversal of the order disqualifying Butler for his contact with the press. If the case is not resolved in Butler's favor on nonconstitutional grounds, however, the First Amendment, on the facts of this case, precludes Butler's disqualification for having communicated with the press about matters relating to a pending case in which he participated.

The trial court erred when it failed to recognize Butler's First Amendment rights and to apply the constitutional presumption that a court cannot punish an individual for communicating with the press. The court punished Butler for conveying information similar to information subject to the court's evidentiary rulings after judging his conduct by a purely discretionary standard and finding that Butler's actions circumvented an evidentiary ruling. In doing so, it impliedly interpreted the evidentiary rulings as protective orders and singled out for punishment Butler's contact with the press. This Court, however, has consistently held that speech cannot be deterred by punishment in order to protect the judicial process except in extremely limited circumstances which are defined by a high constitutional and nondiscretionary standard. Because the threat of punishment will deter speech during the pendency of a proceeding when it can be of great interest and value to the public, an individual cannot be punished for exercising his First Amendment rights by communicating with the press if the communications do not create a serious and imminent harm to the fair and orderly administration of justice.

When the proper standard is applied, it becomes obvious that the record is incapable of supporting the trial court's finding. Butler's actions did not create any serious or imminent harm to the administration of justice. First, he did not violate or circumvent any court order. Evidentiary rulings do not contain any prohibition on disclosure of information to anyone but the jurors during the trial, and the court had not entered a protective order or any restraint on the attorneys' freedom to speak. Second, Butler did not violate a Disciplinary Rule of the District of Columbia Code of Professional Responsibility. Last, and perhaps most importantly, Butler's actions did not interfere with Richardson-Merrell's ability to obtain an impartial jury.

The First Amendment's protection of speech relating to pending proceedings recognizes the importance of uninhibited public discussion about matters before the courts. Participating attorneys, who will be knowledgeable about the proceedings and the underlying issues, can provide valuable information and enhance that discussion; and the press, which regularly covers legal proceedings, can convey the information to the public. Although a judge might prefer to have potential jurors read in the press only those facts that are actually admissible at trial, the rules of evidence do not define the scope of an attorney's right to discuss pending litigation and the underlying legal and social issues. Conveying information similar to that excluded from admission at trial but not under any protective order creates no serious threat to the administration of justice but rather is consistent with the tradition of the openness of judicial proceedings and the public interest in knowing not only what is admitted into evidence at trial but what is not.

If the District Court's order were reinstated, attorneys would speak to the press at the peril that a judge would later find their conduct "so impermissible" as to require disqualification. The severity of the punishment and the vagueness of the standard used to invoke it would inhibit their willingness to speak, effectively label reporters of court proceedings as lepers, and cut short the public's information about proceedings as they unfold.

ARGUMENT

I. THIS CASE SHOULD BE DECIDED ON NONCONSTITUTIONAL GROUNDS.

As Butler argues at length in his brief, this Court has ample cause to affirm the reversal of the District Court's disqualification order on grounds that raise no constitutional issues. For example, this Court could agree with the conclusion of the Court of Appeals that the facts of this case could not justify a disqualification order, and therefore find it unnecessary to reach the constitutional issues that would arise if disqualification were otherwise within the discretion of the trial court. *See In re Oliver*, 470 F.2d 15, 17 n.7 (7th Cir. 1972).

Although urging resolution of this case without reaching constitutional issues, *amici* do not attempt to elaborate on the nonconstitutional grounds for resolving this case. *Amici's* concern focuses instead on the issues raised by the First Amendment—which is relevant both indirectly, as a necessary background for the nonconstitutional issues, *cf. NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979), and directly, if the Court finds it necessary to decide the case on constitutional grounds. Butler's out-of-court communications with the press were speech in pure form, and any attempt to punish him for those communications can be permissible only if it meets the high standards that this Court has found the First Amendment to embody.

II. THE FIRST AMENDMENT PROHIBITS PUNISHMENT FOR OUT-OF-COURT COMMUNICATIONS IN THE ABSENCE OF EVIDENCE THAT THE COMMUNICATIONS CREATED A SERIOUS AND IMMINENT DANGER TO THE ADMINISTRATION OF JUSTICE.

The First Amendment serves the purpose of promoting the free discussion of matters of public interest. *See, e.g., Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). In a well established line of cases, this Court has recognized that on occasion the interest of the public

in having the freedom to discuss pending proceedings and the issues they raise may conflict with the interest of the public in preserving the fair and orderly administration of justice. *See Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). *See also, In re NBC*, 635 F.2d 945, 952 (2nd Cir. 1980); *United States* v. *Haldeman*, 559 F.2d 31, 69-70 (D.C. Cir. 1976) (per curiam) (en banc), *cert. denied*, 431 U.S. 933 (1977). This conflict comes into sharp focus where, as here, an individual is punished for having communicated about matters relating to a judicial proceeding.[1]

In resolving this conflict, this Court has established a standard that protects an individual's First Amendment freedom to speak by allowing punishment only in extremely limited circumstances. When balancing the interests of the administration of justice against the right to freedom of speech, a court must consider the particular communication at issue and the circumstances of its publication to decide whether "the substantive evil of unfair administration of justice" is likely to result and whether the degree of likelihood is sufficient to justify punishment. *Bridges* v. *California, supra*, 314 U.S. at 271. This Court has translated these general considerations into a working principle that sets a high hurdle in the path of any party seeking punishment for a communication. The working principle requires

> " 'that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,' *Bridges* v. *California, supra*, at 263, and that a 'solidity of evidence,' *Florida* v. *Pennekamp, supra*, at 347, is necessary to make the requisite showing of imminence. 'The danger must

[1] This case does not present the situation that existed in *Seattle Times Co.* v. *Rhinehart*, ___ U.S. ___, 104 S. Ct. 2199 (1984), where a party wanted to release information obtained through compelled discovery and subject to a protective order. See p.13, n.2, *infra*.

> not be remote or even probable; it must immediately imperil.' *Craig* v. *Harney, supra*, at 376." *Landmark Communications, Inc.* v. *Virginia, supra*, 435 U.S. at 845.

A court must also consider whether other measures short of punishment will protect the interest in the administration of justice. *Id.* at 843.

In establishing this standard, this Court recognized the importance of the right to speak about pending proceedings. Matters that become the subjects of judicial, administrative or legislative review are often the controversies that command the most public interest and are regularly reported in the press. *See, e.g., Landmark Communications, Inc.* v. *Virginia, supra*, 435 U.S. at 839; *Bridges* v. *California, supra*, 314 U.S. at 268-69. And as this Court has stated, "[f]ree discussion of the problems of society is a cardinal principle of Americanism." *Pennekamp* v. *Florida*, 328 U.S. at 346. The threat of punishment, whether by disqualification, a finding of contempt or a lesser means, would severely abridge that discussion. *See Bridges* v. *California, supra*, 314 U.S. at 269.

In protecting the freedom to speak by restraining the judiciary's power to punish an individual for speech relating to a pending proceeding, this Court has rejected the notion that, absent unusual circumstances, the freedom to speak can be deterred by punishment until after a proceeding is finished in order to minimize any threat to the fair administration of justice. *See Pennekamp* v. *Florida, supra*, 328 U.S. at 346; *Bridges* v. *California, supra*, 314 U.S. at 268-69; *cf. Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 560-61 (1976).

When a proceeding is pending, and particularly as it moves toward or into trial, the interest in the integrity of the judicial process naturally is great and the temptation is to be protective, for example, by limiting what can be said about the proceeding in order to reduce the chance that a juror might be biased by what is said. However, it is at this point that public interest in the controversy is high and the freedom of individuals to speak and the press to publish has great value. Opinions about the underlying policy issues will be highly relevant, as will information about pretrial developments, such as what evidence is

admissible and inadmissible and what issues are and are not before the court in any proceeding. Coverage of the *Westmoreland* trial and the AT&T break-up proceedings is certainly of more value to the public when provided contemporaneously than after the fact. Consequently, the right of public expression cannot be delayed or deferred except in extraordinary circumstances. As this Court stated in *Bridges* v. *California:*

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below [imposing punishments] that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. . . . An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression." 314 U.S. at 269.

The constitutional protection for speech relating to pending proceedings does not vanish when the speaker is an attorney. Although an attorney is an officer of the court and is subject to the ethical and disciplinary rules of his profession, the attorney does not waive the right as either a private citizen or an attorney to talk about issues pending before the courts. *See In re Halkin,* 598 F.2d 176, 186 (D.C. Cir. 1979); *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); *CBS Inc.* v. *Young,* 522 F.2d 234, 239 (6th Cir. 1975); *In re Oliver,* 452 F.2d 111, 114 (7th Cir. 1971); *Chase* v. *Robson,* 435 F.2d 1059, 1061 (7th Cir. 1970) (per curiam); *cf. Wood* v. *Georgia, supra,* 370 U.S. at 393-95.

Indeed, society has a strong interest in ensuring that the participants in legal proceedings, at least in the absence of constitutionally permissible protective or gag orders, are free to relay information and observations relating to those proceedings. "Since lawyers are considered credible in regard to

pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Chicago Council of Lawyers* v. *Bauer, supra,* 522 F.2d at 250; *see In re Halkin, supra,* 598 F.2d at 187; *Hirschkop* v. *Snead,* 594 F.2d 356, 373 (4th Cir. 1979) (per curiam) (en banc).

The public's interest in allowing informed individuals to speak is illustrated by the circumstances of the instant case, where a matter of health and safety of concern to a large sector of the public—the effects of a drug then actively being marketed—lay at the core of the suit. As Judge Robert Bork noted in another context:

> "Thousands of people are acutely concerned about [Bendectin's] safety. Because it was a matter of intense public debate whether the FDA should take action, and, if so, what kind of action, the controversy about Bendectin has a pronounced political component." *McBride* v. *Merrell Dow and Pharmaceuticals Inc.,* 717 F.2d 1460, 1466 (D.C. Cir. 1983).

In such circumstances, pendency of the suit as well as its outcome will be of interest to the public, and the attorneys involved often will be the most knowledgeable of the facts and pretrial status of the case and the most aware of the significance of the issues. Yet allowing a court to punish when no harm occurred and when no order prevented discussion would destroy the freedom of attorneys to speak either as professionals informed about the particulars of the proceedings or as citizens concerned about the issues in general and would deprive the public of valuable information.

The District Court did not apply the standard mandated by the First Amendment for determining whether punishment by means of disqualification was appropriate. In looking only at "whether the conduct of the attorney is so impermissible as to warrant the revocation of his admission *pro hac vice,*" the court did not assess or make findings about the seriousness of the potential harm, if any, created by the communication and whether the degree of imminence of the harm was extremely high. For this reason alone, this Court should uphold the reversal of the order disqualifying Butler.

III. THE DISTRICT COURT COULD NOT HAVE PROPERLY FOUND THAT BUTLER'S COMMUNICATIONS CAUSED A SERIOUS AND IMMINENT DANGER TO THE ADMINISTRATION OF JUSTICE.

If the District Court had applied the proper standard, the record is incapable as a matter of law of supporting a finding that Butler's communications with the press created a serious and imminent danger to the fair and orderly administration of justice. When Butler sent The Post a copy of his letter to Commissioner Hayes and the 14 DERs he had submitted to the FDA and was interviewed by The Post, three potential harms to the integrity of the judicial process in theory might have occurred. First, if Butler violated a constitutionally permissible court order not to speak or to distribute materials, the integrity of court orders could be threatened. Second, if Butler violated an enforceable Disciplinary Rule of the Code of Professional Responsibility, the enforcement of the standards of conduct of the profession could be at issue. Last, release to the public of information about a pending proceeding could create the possibility that individuals who might serve as jurors could not act as impartial decisionmakers at the trial—a concern that underlies the imposition of court orders and disciplinary rules about the dissemination of information relating to pending proceedings. Butler's actions, however, did not trigger any of these three potential harms. He did not violate, or "circumvent," any court order; he did not violate any Disciplinary Rule; nor did his actions interfere with Richardson-Merrell's right to a jury trial. The interest of the court and the public in protecting the judicial system against these concerns was not at jeopardy in the instant case.

A. Butler's Actions Did Not Violate Or Circumvent Any Court Order.

The District Court found, and Richardson-Merrell argues strenuously, that Butler's contact with the press, but apparently not his contact with the FDA, was a "flagrant circumvention" of the court's rulings on the admissibility of the DERs and evidence about the birth defects of Cordova and Sands. The distribution to the press of material that may have been the

subject of evidentiary rulings, however, does not violate or circumvent any order. An evidentiary ruling establishes whether the parties can present specific evidence to the jury once the jury has been selected and the trial has started. Unlike a protective order or gag order, it does not, either directly or indirectly, prevent the attorney or any other individual from speaking publicly about the evidence outside the courtroom.[2]

Richardson-Merrell impliedly proposes a rule of law that would restrain attorneys from discussing or disclosing any evidence held to be inadmissible. Every evidentiary ruling would carry a silent corollary prohibiting communications with the press about inadmissible evidence, the breach of which would expose an attorney to possible disqualification. Under such a regime, every evidentiary ruling might be considered a *de facto* gag order, or prior restraint, on communications with the press that would be insidious in its silence, offering no stated standard for conduct but carrying heavy sanctions. Rules governing the ability to communicate certainly cannot be implied but rather must be explicit and specific. *Cf. Hynes* v. *Borough of Oradell*, 425 U.S. 610, 620 (1976); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The restraint also would be grossly overbroad and uncontainable. If a communication with the press were prohibited, then communications with a government agency or a member of the public, which just as effectively could put the information in the public domain, would also have to be prohibited. Yet it may be of great public importance that individuals other than the press be able to discuss issues that are the subject of litigation as well as matters not covered by litigation due to evidentiary rulings or the narrowing of the scope of litigation.[3]

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[2] An attorney's constitutional right to convey information may be limited if, unlike the circumstances in this case, the information was produced under the compulsion of a discovery order and the court has entered a protective order. See *Seattle Times Co.* v. *Rhinehart*, ___ U.S. ___, 104 S. Ct. 2199, 2209-10 (1984). In the instant case, Butler did not obtain the information he conveyed through the discovery process, and no protective order existed.

[3] Indeed, the District Court here seemed to sense the scope of this problem by expediently basing the punishment of Butler not on his letter to the FDA Commissioner, but rather on his sending a copy of the letter to the Post reporter.

Lastly, Richardson-Merrell's implied order would be inconsistent with the standards this Court has established for prior restraints. This Court has unequivocally established that prior restraints must overcome a heavy presumption of invalidity in order to survive constitutional scrutiny. *See Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 570. They can survive only if the court finds that the nature and extent of the publicity would distort the views of potential jurors, that alternatives to prior restraints would not sufficiently mitigate the effects of publicity, and that the restraint would effectively prevent the threatened danger. *See id.* at 562, 569.[4] Although punishable by disqualification rather than contempt, the rule Richardson-Merrell proposes would deter speech just as effectively. Richardson-Merrell cannot obtain the benefits of a prior restraint without bearing the heavy, fact-specific burden of proving that the order would pass constitutional muster.[5]

B. Butler's Actions Did Not Violate A Disciplinary Rule Of The Code Of Professional Responsibility.

Richardson-Merrell asserts that Butler violated the Disciplinary Rules of the District of Columbia Code of Professional

[4] This Court noted in *Nebraska Press Association* v. *Stuart, supra,* the suggestion that an alternative to a restraint on the press would be a court-imposed limitation on what participating attorneys could say about a pending criminal case. 427 U.S. at 564. The Court's comment, however, did not suggest that the substantive constitutional standards that could justify such an order would be less rigorous than those required to support other prior restraints. Such an order could be imposed only "in appropriate cases," *id.*, and therefore certainly not in every case, whether criminal or civil, in which evidence is ruled inadmissible. Also, such an order presumably would be issued in advance so the restrained individuals would know its scope and have an opportunity to object.

[5] The logical end result of Richardson-Merrell's position would be to make hearings about the admissibility of evidence in criminal and civil cases presumptively closed to prevent the press from publishing information about evidence ruled inadmissible. This consequence would be contrary to the Sixth Amendment's presumption that a suppression hearing will be open to the public, *Waller* v. *Georgia,* ___ U.S. ___, 104 S. Ct. 2210, 2216 (1984), and to the common law tradition of the openness of civil hearings. Similarly, court records describing or containing inadmissible evidence presumptively would be sealed, which would also be contrary to established common law. See *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 597 (1978).

Responsibility, but it does not elaborate or cite any support. The District Court did not find that Butler had violated any Disciplinary Rule; indeed, by stating that conduct short of a violation of a Rule may warrant disqualification, it implied strongly that he had not. *See* Pet. App. 75a.

Nor did the Court of Appeals find that he had violated a Rule. Instead, the Court of Appeals specifically found that Butler did not violate DR7-108(A) and (B)(1) of the District of Columbia Code of Professional Responsibility, which prohibit referring to inadmissible evidence at trial, and DR7-106(C)(1) and (C)(7), which prohibit direct extrajudicial communication with jurors. Pet. App. 52a. In its amended opinion the Court of Appeals avoided deciding whether Butler violated DR7-107(H), which discusses the scope of a lawyer's freedom to discuss pending civil litigation. *See* Pet. App. 71a. In its original opinion the Court of Appeals had found that no violation occurred. *See* Pet. App. 54a. Richardson-Merrell makes much of this change, insinuating that the court's hesitancy to decide the issue sprang from subsequent questions about Butler's behavior. In fact, the court's amendments seem intended to allow the court to avoid the constitutional question whether an additional standard should be read into DR7-107(H) to maintain its constitutionality—as it should since the trial court did not base its actions on DR7-107(H).

Given this record, this Court has no basis to find independently that Butler's activities violated the Disciplinary Rules and therefore created any harm, much less a serious and imminent danger to the administration of justice. Moreover, remand for a determination whether Butler had violated DR7-107(H) would be inappropriate because, as discussed below, an interpretation of DR7-107(H) that would justify penalizing Butler would be unconstitutionally vague and overbroad.

C. Butler's Activities Did Not Create A Serious And Imminent Danger That The Jury Would Be Prejudiced.

The last potential harm to the fair administration of justice would be the danger of jury prejudice—a danger that could also occur if an attorney violates orders prohibiting the release of information and disciplinary rules governing contacts with

the press. Butler's contacts with the press, however, created no serious or imminent danger that a jury could not render an impartial decision in the case.

Importantly, the District Court never found that publicity on the Bendectin issue had saturated the jury pool or that devices such as voir dire could not adequately protect Richardson-Merrell's right to a jury trial. The court pointed only to the fact that mention of the DERs appeared in *The Post* after the jury panel for the month of February had been drawn and that Butler's silence at the hearings implied that he intended to prejudice Richardson-Merrell's case. Pet. App. 77a-78a. These findings do not constitute the "solidity of evidence" required to support the conclusion that actual prejudice was a serious and imminent danger. *Landmark Communications, Inc.* v. *Virginia, supra,* 435 U.S. at 845 (citing *Pennekamp* v. *Florida, supra,* 328 U.S. at 347).

Nor, as the Court of Appeals determined, could the District Court have found that Butler had actually threatened Richardson-Merrell's ability to be judged by an impartial jury. *See* Pet. App. 54a-55a. Given that "even pervasive adverse publicity" will not inevitably result in an unfair trial, *Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 554, the article in *The Post* about various pending Bendectin cases and the 14 incidents Butler had reported to the FDA certainly would not have biased the jury pool against Richardson-Merrell. First, not all potential jurors would have seen the February 7th issue, and not all of those who did would have read the story, which did not even appear on the front page. Second, those who read the article would not have been prejudiced against Richardson-Merrell. The article discussed seven different lawsuits in which plaintiffs alleged that Bendectin had caused birth defects, but in doing so it presented both sides of the Bendectin issue with equal weight. In addition, the article did not focus primarily on the pending *Koller* case, allocating only three out of 23 paragraphs to the case midway through the article. When the case was mentioned, views of both sides were given. It is inconceivable that press coverage of this issue could have impaired the defendant's right to a fair trial by jury, much less just one balanced article, published in isolation and not in the midst of a publicity binge about the case. *See* J.A. 129.

Moreover, any threat to the administration of justice cannot justify punishment if other measures will protect the public's interest. *See Landmark Communications, Inc.* v. *Virginia, supra,* 435 U.S. at 843. In this instance, voir dire serves as a principal means of guaranteeing the impartiality of the jury. *See, e.g., Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 564. By probing potential jurors, voir dire can exclude those individuals who would not be able to render an impartial decision, not as Richardson-Merrell suggests, all those who read. *See Patton* v. *Yount,* ____U.S.____, 104 S. Ct. 2885, 2891 (1984); *Irvin* v. *Dowd,* 366 U.S. 717, 722-23 (1961). Early in the case, before Butler's communication with The Post, Richardson-Merrell recognized the role of voir dire, and it was fully prepared to screen out those individuals who had been biased by press coverage. Ten of the voir dire questions it submitted in December, 1982 focused on the effect of press coverage on potential jurors. J.A. 15-16. If a court and the parties cannot rely on voir dire to protect against prejudice in a case such as this one, where little publicity has occurred, they certainly could not proceed to try, as they do, criminal and civil cases attended by prominent and frequent coverage. *See, e.g., Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 562, 565; *CBS Inc.* v. *District Court,* 729 F.2d 1174, 1180-81 (9th Cir. 1984) (pretrial publicity in DeLorean case); *In re NBC,* 635 F.2d 945, 948 (2d Cir. 1980) (pretrial publicity in Abscam case); *United States* v. *Haldeman,* 559 F.2d 31, 61-62, 69-70 (D.C. Cir. 1976) (per curiam) (en banc), *cert. denied,* 431 U.S. 933 (1977) (pretrial publicity in Watergate case). *Compare Sheppard* v. *Maxwell,* 384 U.S. 333, 338-49 (1966).

In sum, neither the District Court's findings of fact nor the facts in the record can support the conclusion that Butler's contacts with the press jeopardized the fair and orderly administration of justice. Even if this Court were to review an attorney's out-of-court communications against a constitutional standard less protective than the serious-and-imminent-danger standard upon which *amici* rely, the result would be no different. Thus, as a matter of law, Butler should not have been disqualified for communicating with the press.

IV. ANY INTERPRETATION OF DISCIPLINARY RULE 7-107(H) THAT WOULD JUSTIFY DISQUALIFICATION HERE WOULD BE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Lastly, any interpretation of the Disciplinary Rule which resulted in a finding that Butler's conduct violated the rule would be unconstitutionally vague. This Court has a longstanding principle that governmental rules of conduct violate due process if they do not clearly define what activities are impermissible. Because individuals have a right to know what conduct will expose them to penalties so that they may conduct themselves accordingly,

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

See also Hynes v. *Borough of Oradell, supra,* 425 U.S. at 620; *Buckley* v. *Valeo,* 424 U.S. 1, 77 (1976); *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972); *United States* v. *Cardiff,* 344 U.S. 174, 176 (1952).

When the regulated activity involves First Amendment rights, as DR7-107(H) would in the instant case, an even greater degree of specificity is required. *See, e.g., Hynes* v. *Borough of Oradell, supra,* 425 U.S. at 620; *Buckley* v. *Valeo, supra,* 424 U.S. at 77; *Smith* v. *Goguen,* 415 U.S. 566, 573 (1974); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961); *Smith* v. *California,* 361 U.S. 147, 151 (1959); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931). As this Court explained in *NAACP* v. *Button* when determining whether a statute governing the disbarment of lawyers for soliciting clients was void for vagueness,

> "[First Amendment] freedoms are delicate and vulnerable as well as extremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need

> breathing space to survive, government may regulate in the area only with narrow specificity." 371 U.S. at 433 (citations omitted).

Disciplinary Rule 7-107(H) fails to define with any specificity whether Butler's contact with the press was prohibited and would subject him to the serious potential sanctions for violations of disciplinary rules. The rule recites the text of Canon 20 of the Canons of Professional Ethics, and the inclusion of the Canon in the rule implies that the Canon was adopted as a rule. Unlike the other rules in the Code, however, it contains no mandates defining permissible or impermissible behavior.

In discussing prohibited contacts, DR7-107(H) states:

> "Newspaper publications by a lawyer as to pending or anticipated litigation *may interfere* with a fair trial in the Courts and *otherwise prejudice* the *due administration of justice. Generally* they are to be *condemned.*" (Emphasis added.)

Butler would have had no way of knowing which publications would be offensive and when they would be condemned—in short, how to interpret the italicized words in the rule.

The rule is similarly elusive when it addresses the circumstances under which a lawyer can make a statement to the press:

> "If the *extreme* circumstances of a particular case *justify* a statement to the public, it is *unprofessional* to make it anonymously. An *ex parte* reference to the facts *should* not go beyond quotation from the records and papers on file in court; but even in *extreme* cases it is *better* to avoid any *ex parte* statement." (Emphasis added, except "*ex parte.*")

Butler could not know by reading the rule the circumstances under which comment is allowed and whether the rule specifically prohibits certain conduct. Lacking the constitutionally required "precision of regulation," *NAACP* v. *Button, supra,* 371 U.S. at 438, the rule would be unconstitutional as applied to Butler.

An interpretation of Disciplinary Rule 7-107(H) in this case to justify Butler's disqualification would also be unconstitutionally overbroad. The government and courts cannot control conduct "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964); *see Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973); *Thornhill* v. *Alabama, supra*, 310 U.S. at 97. Such an overly broad restraint is no "less pernicious than the restraint on freedom of discussion imposed by the threat of censorship." *Thornhill* v. *Alabama, supra*, 310 U.S. at 98 (footnote omitted).

If the general condemnation of statements to the press in DR7-107(H) were interpreted to encompass the protected speech that occurred in the instant case, it would be unconstitutional. As discussed above, speech can be punished in only extremely limited circumstances, which did not exist when Butler communicated with the press. Rather, taking a diametrically opposed position, the rule apparently subjects to punishment all statements to the press except those made in undefined "extreme circumstances." The Legal Ethics Committee of the District of Columbia Bar in effect concluded that the Rule was overbroad when it stated years ago that it would be "hesitant" to interpret the Rule in a way that would "thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of a substantial threat to the due administration of justice." Formal Op. 8 (1975). The Court of Appeals seconded this conclusion when it called the Committee's Opinion "the proper interpretation." Pet. App. 54a. Thus, both the vagueness and overbreadth of DR7-107(H) as applied in this case would preclude a court from enforcing the rule against Butler.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' reversal of the District Court's order revoking Butler's *pro hac vice* appearance on the basis of communications with the press.

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Respectfully submitted,

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